Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DONZELL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of the judicially imposed "*Feres* doctrine" is appropriate in medical malpractice claims brought by military personnel when Congress enacted the Federal Tort Claims Act (hereinafter FTCA) to only prohibit lawsuits by service personnel against the United States for injuries arising out of combatant activities.

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PETITION FOR WRIT OF CERTIORARI

Donzell Jones respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case and overturn the "*Feres* doctrine" in medical malpractice claims against military medical providers.

OPINIONS BELOW

The opinion of the Court of Appeals (referred to herein as "*Jones Appeal*") appears at Appendix A to the petition and is reported at 112 F.3d 299 (1997).

The opinion of the district court appears at Appendix B to the petition and does not appear to have been officially reported.

JURISDICTION

The Court of Appeals entered its judgment and order on April 24, 1997. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Section 2674 of the Federal Tort Claims Act provides, in pertinent part, that "the United States shall be liable, respecting the provisions of the title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ." Section 2680 of the Federal Tort Claims Act, provides, in pertinent part, an exception stating this chapter will not apply to "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard during times of war." The texts of these sections are set forth at Appendix D.

STATEMENT

Donzell Jones initiated this case to seek compensation for the injuries he sustained as the result of alleged medical malpractice in a Naval hospital. Sergeant Jones, an outstanding track athlete, voluntarily joined the Army in 1986. As a result of his phenomenal athletic ability, Donzell Jones earned a chance to compete in the United States Military Olympic tryouts in the San Francisco/ Oakland California area in 1992. While there, Sergeant Jones began to experience stomach pain. After initially seeking medical attention in an Army hospital at the Presidio, he was transferred to Oakland Naval Hospital where on June 22, 1992, he had surgery performed to relieve his stomach pain. During the surgery, compression leg stockings were applied to prevent permanent damage from loss of blood circulation to the lower legs. The stockings were not adequately checked and the lack of blood to his legs caused bilateral compartment syndrome, a devastating injury causing permanent leg damage. Ironically, his dream of participating in the Olympics turned into a never-ending nightmare, because now it is not only impossible for Donzell Jones to run, but it is also extremely difficult for him to even walk.

Donzell Jones' surgery was not the result of a war or of a combatant activity. Additionally, his decision to see military doctors was not a result of personal preference, but like many civilians who are covered by employer-provided HMO's or other forms of managed health care, was based upon where his employer's "insurance plan" would provide coverage; in this case, military hospitals. Most importantly, the negligence that he complains of is medical neglect and the failure to carry out duties that every physician owes to a patient. These facts and the

plain words of the FTCA seem to clearly provide Donzell Jones with a method to seek redress for the wrong but for the judicially created *Feres* doctrine.

PROCEEDINGS BELOW

The initial complaint filed in this action specifically sought to challenge the *Feres* doctrine. Exhibit D-5. Congress enacted to eliminate the doctrine of sovereign immunity as applied to the Federal government. *Feres* is a judicially created interpretation of an exception to the FTCA. The district court granted defendant's motion to dismiss for lack of subject matter jurisdiction based on the doctrine set forth in *Feres v. United States*, 340 U.S. 135 (1950). According to the trial judge, Donzell Jones' injury in a naval hospital satisfied the *Feres "incident to service"* test. The court ruled that Jones' use of the military hospital was based ". . . solely by virtue of his status as a serviceman . . .," and hence his injury was "incident to service." Appendix B-4.

The Court of Appeals' affirmance was likewise based upon the *Feres* doctrine. In stating its approval of the district court's decision, the court stated:

> "Once it is determined that a servicemember . . . was on active duty during the time military medical treatment was rendered, the treatment is necessarily incident to service and judicial inquiry ends."

The appeals court concluded by stating:

> "We have consistently found that a service-member's injury is incident to military service whenever the injury is incurred while the individual is on active duty or subject to military discipline."

112 F.3d at 302; Appendix A-6 and A-7.

REASONS FOR GRANTING THE PETITION

The *Feres* doctrine should be revisited by this Court because of the inconsistent applications of the *Feres* doctrine among the circuits since this Court last spoke out on the doctrine in *United States v. Johnson*, 481 U.S. 681 (1987). The reasoning of the Seventh Circuit in *Jones Appeal* is also followed in the First and Tenth Circuits, and directly conflicts with decisions in the Fourth, Fifth, Ninth, and Eleventh Circuits and with earlier decisions of this Court. The Seventh Circuit has stated that "*Feres* is alive and well." *Duffy v. United States*, 966 F.2d 307 (7th Cir. 1992). *Feres*, however, should be dead and buried in medical malpractice cases.

A. Conflicts Among the Circuits Result in Disparate Decisions

"Shopping the circuits" has taken on a new meaning since the last Supreme Court decision on a *Feres* case. Although this Court attempted to put the *Feres* doctrine to rest in *United States v. Johnson*, 481 U.S. 681 (1987), the circuits have been unable to develop consistent standards to determine if cases are *Feres* barred. In the Fourth, Fifth, Ninth, and Eleventh Circuits, a more liberal and encompassing standard is used to determine the applicability of the *Feres* doctrine. In particular, these circuits do not treat active duty status as the deciding factor when determining if the suit is *Feres* barred.

In the Ninth Circuit, active duty status is not the deciding factor. In *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991), three airmen broke into the plaintiff's office during the middle of the night and stole her personal letters which they later copied and distrib-

uted to various squadron personnel. *Id.* at 1479. The plaintiff-Commander filed suit alleging that the sergeants were attempting to ruin her reputation and career. *Id.* In response, the Government argued that *Feres* barred the plaintiff's case because she was on active duty at the time of the injury and also that she was subject to military discipline. *Id.* at 1485. The Ninth Circuit expressly refused to solely apply these criteria, because such broad indicators would operate to disallow claims by servicemen entirely. *Id.* Such a sweeping rule was expressly rejected by the Supreme Court in *Stanley v. United States*, 483 U.S. 669 (1987). *Id.* The court ruled that the presence of active-duty status or subjection to military discipline is insufficient standing alone to invoke *Feres*. *Id.* at 1486. Unlike the First, Seventh and Tenth Circuits, the Ninth Circuit examined other factors, such as whether the injury was derived from on-the-job activities and whether the act served some military purpose. *Id.* at 1487. Since the perpetrator's duties did not require them to steal personal letters from a locked area in their Commander's office and the theft did not serve any conceivable military purpose, the court ruled that her injury was not "incident to service" and was consequently not *Feres* barred. *Id.* at 1486. Accordingly, suits in the Ninth Circuit are examined more extensively than merely inquiring as to the duty status of the servicemember at the time of injury.

The broad consideration that the Ninth Circuit affords *Feres* cases can also be seen in *Dreier v. United States*, 95 F.3d 1435 (9th Cir. 1996). In this recent case, the off-duty servicemember was relaxing in a recreational area that was limited to military members and civilians who had obtained a permit. *Id.* at 1438. After sunbathing,

swimming and drinking beer, the servicemember and some of his friends decided to take a walk in the area. *Id.* During the walk, the group came upon a drainage channel which was hidden by overgrown foliage. *Id.* The off-duty servicemember fell into the channel and was crushed to death. *Id.* In deciding whether the *Feres* doctrine barred the case, the Ninth Circuit looked at four factors to see if the injury was incident to service: (1) the place of the negligent act; (2) the duty status of the plaintiff when the negligent act occurred; (3) the benefits accruing to the plaintiff because of his status as a servicemember; and (4) the nature of the plaintiff's activities at the time of the negligent act. *Id.* at 1440. The Ninth Circuit also stated that the most relevant inquiry is "whether or not the servicemember's activities at the time of injury are of the sort that could harm the disciplinary system if litigated in a civil action." *Id.* at 1441. After examining all of these factors and addressing relevant inquiries, the court found that the servicemember's widow had an FTCA action that was not *Feres* barred. Interestingly, the government refused to appeal the decision.

The Eleventh Circuit also looks beyond the duty status of a servicemember at the time of their injury. In a case involving a faulty ventilation system in a military apartment building, a servicemember and his wife filed an FTCA claim for extensive injuries resulting from carbon monoxide poisoning. *Elliott v. United States*, 13 F.3d 1555 (11th Cir. 1994). In determining whether *Feres* barred the suit, the court focused on three factors: (1) the duty status of the servicemember; (2) the situs of the injury; and (3) the activity the servicemember was engaged in at the time of the injury. *Id.* at 1560. After look-

ing at all of these factors, the Eleventh Circuit then looked at the "totality of the circumstances" to determine if *Feres* applied. *Id.*

In *Elliott*, the Eleventh Circuit also inquired into the three rationales for the *Feres* doctrine. *Id.* at 1559. After dismissing the first and second rationales as "no longer controlling" and "if not completely erroneous," the court then focused on the effect of the suit on military discipline. *Id.* Significantly, the court found that "providing and maintaining single-family housing for military personnel does not involve the federal judiciary in sensitive military affairs or the 'second-guessing of military orders.'" *Id.* at 1560. Consequently, the court ruled that the *Feres* doctrine did not bar the plaintiff's suit.[1] *Id.* at 1563. Incidentally, one of the three original *Feres* cases decided was also a housing case very similar to *Elliott*. *See*: *Feres v. United States*, 340 U.S. 135 (1950). *Jones Appeal* is a medical malpractice claim just as were the other two consolidated *Feres* cases. Surely, if the housing cases should fall, so should the medical malpractice cases. The *Elliott* decision has not appeared to have had the adverse affect on military discipline as the argument for barring the claim seemed to implicate. Hence, it appears that not only are the circuits in disagreement on which factors to apply when deciding whether a suit is barred by *Feres*, but there is also a serious question as to the validity of the articulated rationales of the *Feres*

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[1] Petitioner does note, however, that the Eleventh Circuit decided to then hear the case *en banc*, but because the vote *en banc* was evenly split, the district court's decision that the plaintiff's claims were not *Feres* barred, was affirmed by operation of law. *Elliott v. United States*, 37 F.3d 617 (11th Cir. 1994).

doctrine, when applied solely on the basis of active duty status.

The Fourth Circuit has also expressly rejected treating active duty status as a dispositive factor. In a medical malpractice case, for example, a serviceman who was on excess leave awaiting the ruling of an appeal of his court-martial, sought medical treatment at a military hospital. *Appelhans v. United States*, 877 F.2d 309 (4th Cir. 1989). The plaintiff argued that since his injury occurred while he was on excess leave pending discharge, his injury was not "incident to service." *Id.* at 312. Significantly, the court in making it's decision stated that "the plaintiff's active duty status, standing alone, is insufficient to invoke the *Feres* doctrine's bar." *Id.* at 311. Instead of treating duty status as the decisive factor, the Fourth Circuit, unlike the Seventh Circuit, followed the conclusions from other cases that stated the receipt of medical treatment at military facilities is "incident to service." *Id.* While noting that four justices on the United States Supreme Court believed that *Feres* was wrongly decided, the Fourth Circuit nonetheless felt obliged to apply precedent. *Id.* at 313. While the Fourth Circuit dismissed the suit, it declined to use active duty status as a dispositive factor.

The Fifth Circuit also does not use active duty status in a such a determinative way that creates a "bright-line" conclusive test. In *Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988), a servicemember on the Temporary Disability Retired List (TDRL) jumped from a window of an Army Medical Center. The serviceman's widow brought an FTCA suit claiming that the medical personnel at the hospital failed to prevent his suicide. *Id.* at 724. In response to the government's contention that the

Feres doctrine barred her suit, the plaintiff argued that injuries occurring while the servicemember is on TDRL are not "incident to service." *Id.* The Fifth Circuit agreed with the plaintiff and specifically stated that "a listing on the TDRL [is not] considered the equivalent of active duty." *Id.* at 726. Additionally and contrary to the Fourth Circuit, the court ruled that the fact that the servicemember was receiving disability pay and was eligible for treatment in a government hospital were not sufficient reasons to warrant a *Feres* bar. *Id.* at 727. Consequently, the fact that the servicemember was injured while in a military hospital and was on active duty although temporarily disabled, was not dispositive.

The standards in the Fourth, Fifth, Ninth and Eleventh Circuits directly conflict with the standards in the First, Seventh and Tenth Circuits. In the First and Tenth Circuits, which are in accordance with the Seventh Circuit in this case, the *Feres* inquiry ends and the person is found to have been acting "incident to service" once it is determined that the servicemember was on active duty.

In a First Circuit case, a serviceman, who had injured himself playing basketball while off-duty, sought damages against military and civilian doctors for services negligently rendered in a military hospital. *Borden v. Veterans Administration*, 41 F.3d 763 (1st Cir. 1994). The court ruled that the decision to apply the "incident to service" test *depended* on the plaintiff's military status. *Id.* at 763 (emphasis added.) The First Circuit also decided that the plaintiff's claim was barred, regardless of the fact that he was off-duty at the time of the injury, because he was an active servicemember and such persons are entitled to medical treatment at military hos-

pitals. *Id.* at 763-64. After determining that active servicemembers are entitled to such medical benefits, the First Circuit ended its inquiry and barred the servicemember's suit.

The Tenth Circuit also finds that active duty status automatically triggers the *Feres* bar to a servicemember's suit. In one particular case, a captain in the Air Force was injured while on terminal leave anticipating his retirement. *Madsen v. United States*, 841 F.2d 1011 (10th Cir. 1987). Upon entering the hospital, the captain was placed on the Temporary Disability Retired List (TDRL). *Id.* at 1011. The plaintiff argued that the nature of his active duty was tantamount to military leave or discharge and therefore his FTCA suit should not be barred. *Id.* at 1012. In response, the Tenth Circuit first stated that "the *Feres* doctrine is *predicated* upon his military status at the time of the negligent act." *Id.* at 1012. (emphasis added). The court also felt that the nature of the servicemember's involvement with the military at the time of injury did not change the fact that a person is still on active duty. *Id.* at 1013. In conclusion, the court stated that "once it is determined that a servicemember . . . was on active duty during the time military medical treatment was rendered, the treatment is necessarily incident to service and judicial inquiry ends." *Id.* at 1014. Hence, Captain Madsen was automatically barred from a FTCA suit, because his negligent treatment occurred while he was on active duty, albeit temporarily disabled.

This Court established that the *per se* application of the *Feres* doctrine in military claims was eliminated in *United States v. Shearer*, 473 U.S. 52 (1985). In that case, this Court specifically stated:

> "The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *Id.* at 57.

Consequently, focusing only on the active duty status of a servicemember allows some circuits to retain the "bright-line" rule that was precisely abolished by this Court.

An examination of the standards between the circuits immediately reveals that servicemembers have a better chance of surviving a *Feres* attack in the Fourth, Fifth, Ninth and Eleventh Circuits than in the First, Seventh and Tenth Circuits. Consequently, injured servicemembers are only encouraged to "shop" the circuits to find those courts that employ more encompassing and liberal standards. Such a disparity between the circuits should be addressed by this Court to prevent the grave and inequitable results that currently plague servicemembers throughout this country. These differing standards that have produced the incentive to "shop the circuits" have developed partly as a result of the illogical application of certain rationales of the *Feres* doctrine.

B. Application of the Rationales for the *Feres* Doctrine Induces Divergent Opinions Amongst the Circuits

The ever-growing divergent *Feres* type decisions and illogical outcomes result from applying rationales for the doctrine. The three rationales for the *Feres* doctrine that were articulated in the last Supreme Court decision of *United States v. Johnson*, 481 U.S. 681 (1987) are: (1) the relationship between the Government and members

of its armed forces is distinctively federal in character; (2) the existence of . . . generous statutory disability and death benefits . . .; and (3) servicemember suits are the types of claims that would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.

The irrationality of these reasons was best articulated in Justice Scalia's lengthy dissent in *Johnson. Supra.* Petitioner could not adequately rephrase what Justice Scalia wrote and therefore adopts his reasoning. Petitioner, however, wishes to briefly demonstrate to this Court just how illogical the rationales are applied in the medical malpractice context since *Johnson. Supra.*

The second rationale, which has serious logical flaws, states that since other generous statutory benefits already exist, an FTCA suit is unnecessary. This Court has put much emphasis on the fact that Congress passed the FTCA with the intention of providing for those who were not adequately provided for. The key phrase in this sentence is "adequately provided for." Courts have concluded that the Veteran's Act compensation is far superior to state worker compensation laws. *See: Kendrick v. United States*, 877 F.2d 1201 (4th Cir. 1989) and *Sidley v. United States*, 861 F.2d 988 (6th Cir. 1988). Consequently, the rationale concludes that a personal injury suit is unnecessary. But are military members adequately compensated for their injury, disability and pain and suffering? Furthermore, the fact that numerous lawsuits are filed each year to seek compensation for injuries sustained while servicemembers are coincidentally employed in the United States military, answers this question as a resounding "no."

The FTCA was created, in part, to avoid the introduction of individual congressional bills for the purpose of compensating victims of federally employed tortfeasors. This purpose is defeated by the *Feres* doctrine. A search of congressional legislation would reveal that bills are being initiated to compensate military members who have been the subject of a tort while serving in the military. *See*: H.R. 221, 103rd Cong., 1st Sess. (1993) and H.R. 546, 104th Cong., 2nd Sess. (1996). If Congress intended to prevent wasting time on individual bills, they should not be forced to spend valuable time "litigating" individual claims. The reason for this "waste of time" lies in the judicially created *Feres* doctrine.

Feres generally allows military doctors to remain comfortable in the fact that they cannot civilly be held liable for committing malpractice against their patients. Military doctors have no incentive to take medically accepted precautions when treating a patient, because the physician knows that they cannot be held accountable for committing malpractice. Doctors, who are immune from prosecution, almost have a license to commit malpractice. *Feres*, in a medical malpractice setting, defeats the purpose of Congress enacting the FTCA.

The third rationale also seriously suffers from illogic. For example, if a veteran patient is wheeled into the emergency room of a veteran's hospital, the doctors must adhere to the medical standards and guidelines regardless of whether the patient is on the temporarily disabled list (TDRL) or is permanently disabled. However, in the world of *Feres*, an active duty servicemember whose surgery is performed with gross negligence is only able to successfully maintain an FTCA suit if he or she is

wearing the right hat in the right circuit. In some circuits, a servicemember can maintain a suit if he/she is on the TDRL list. *See: Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988). In other circuits, the same person would not have a chance of success. *See*: *Madsen v. United States*, 841 F.2d 1011 (10th Cir. 1987). A judge, when deciding cases involving serious injury to military personnel, must determine how the military is more likely to face intrusive interference from civil courts if the patient is off duty than if the person is on active duty. Although medical principles will be scrutinized by the Court if the person has been discharged from the military, the claim can be allowed despite the *Feres* doctrine. Yet, when an active duty servicemember suffers the same injury, the courts create the fiction that sensitive military affairs may be improperly violated. The courts are not scrutinizing medical guidelines in active duty cases as they do in discharged servicemember cases. Not only does this not make any sense, but it is also unfair to our military personnel. The policies and discipline of military doctors should be the same regardless if the person is discharged from the military, temporarily or permanently disabled, or even on active duty. The same policies and guidelines should be applied when a procedure is incorrectly performed regardless of the status of the patient. Military discipline and the chain of command are not affected any differently if the court can peruse medical standards in a permanently disabled servicemember case as opposed to an active duty member case. Military physicians should be judged by the same medical standards that civilian doctors are required to uphold.

If Congress had specifically provided in the FTCA that military personnel on active duty were barred from any suits against the government or government personnel, this Court might properly have condoned the bright-line test now being applied by certain circuits. Congress, however, limited the government's immunity to tort claims by military personnel to "combatant activities . . . during times of war." The *Feres* doctrine, itself, may be criticized as an intrusion into the legislative function. The application of the doctrine by courts to bar servicemembers from the right to make claims for injuries sustained at the hands of negligent physicians is outrageous.

CONCLUSION

Petitioner is aware that the Supreme Court has denied petitions for certiorari brought by other military personnel that have *Feres* barred claims and that Congress has been unsuccessful in legislating an end to the *Feres* doctrine. Petitioner here seeks only a modification of *Feres* to allow for military personnel to sue the government and its health care providers for medical malpractice. Immunity from medical malpractice claims can only reduce the quality of military medical care in general. Additionally, such immunity provides a haven for incompetency. We can but concur with the statement of Justice Felix Frankfurter that sovereign immunity is a "doctrine without moral validity" and an "anachronistic survival of monarchial privilege [which] runs counter to

democratic notions of the moral responsibility of the state." *Kennecott Copper Co. v. State Tax Commission*, 327 U.S. 573, 580-81 (1946).

Respectfully submitted,

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